IN THE EMPLOYMENT TRIBUNAL

Claim No. 62/2021

BETWEEN:

KEVIN ANTHONY WILLIAMS

Claimant

-AND-

OCS LOGISTICS LIMITED

Respondent

JUDGMENT

The Claimant's Claim for unfair dismissal is well-founded and succeeds.

Chairperson:	Ms Gabrielle O'Hagan
For the Claimant:	In person
For the Respondent:	Mr Paul Rose, Financial and Managing Director of the Respondent

1. The Claimant was employed by the Respondent from 13 December 2019 as a Delivery Operative /Warehouse Assistant until his dismissal on 25 August 2021.

2. The Claimant filed a Claim Form on 1 October 2021 making a claim for unfair dismissal, arrears of pay and arrears of holiday pay and seeking reinstatement and an apology or, if reinstatement is not possible, compensation, with attached copy correspondence and documentation.

3. The Respondent filed a Response Form on 4 October 2021 denying the Claim in its entirety with attached copy correspondence, documentation and a video recording.

4. A Preliminary Hearing took place on 4 October 2023 and a Case Management Order was made. Neither party complied with any of the provisions of the Order, save that the Respondent submitted a bundle of documents, including incident reports by Mr Paul Rose (Financial and Managing Director of the Respondent) dated 26 October 2023, Mr Jonathan Ponce de Leon (Operations Director) dated 31 October 2023 and Mr Mark Casciaro (Warehouse Manager) dated 6 November 2023, as well as an open letter from Ms Amber Ash, General Manager for Trends clothing shop, dated 1 October 2021.

5. The substantive Hearing took place on 27 February 2024. The Claimant, who had not produced a witness statement, gave evidence by confirming the contents of the Claim Form and giving live evidence. For the Respondent, evidence was given by the incident reports dated October and November 2023 and live evidence, by Mr Rose, Mr Ponce de Leon and Mr Casciaro. Neither party was legally represented: the Claimant represented himself and Mr Rose represented the Respondent.

The facts

6. The Claimant's written Contract of Employment provides at paragraph (xii):

"***Dismissal:*** *The Company hopes that it will not become necessary to dismiss an Employee, however, it must be understood that there are certain breaches of Company Rules for which, after the facts have been ascertained, an Employee may be summarily dismissed or suspended, without pay, pending further investigations. In such an event, an Employee will be afforded a full right of representation of his/her case to the Company before a final decision is made….*

The employer reserves the right to dismiss an employee without lieu of notice or payment in lieu of notice under the following conditions: …

- *The Employee commits an act of aggression, verbal or physical towards another member of staff or client or any member of the public whilst in the employ of the company.*

At all times the Employer will abide by procedural fairness under current employment legislation when dealing with dismissals from the Company."

7. It is not in dispute that on the afternoon of Friday, 13 August 2021, by 3 trips, the Claimant delivered on foot by trolley 14 boxes of stock to the Tuckey's Lane store of a client of the Respondent (Trends clothing shop) from the International Commercial Centre in Casemates Square. When the Claimant brought the last boxes to the store, all of the boxes he had delivered were still sitting outside. The Claimant was very angry, given the high value of the contents of the boxes, and as he had previously requested that the storeman be notified that he would be making the delivery.

8. It is also not in dispute that the Claimant went to Trends and raised his voice at the shop assistant, who could see he was annoyed, and that a male assistant then appeared, "*shouting "Nobody shouts in here" (in Spanish)*" (according to the Claim Form), nor that the Claimant left without the invoices being signed, which he had never done before.

9. The Claimant alleges that on his way back to the Respondent's premises, he telephoned Mr Ponce de Leon and told him what had happened. According to the Claimant, Mr Ponce de Leon said he had done the right thing and told the Claimant to bring the invoices back with him. In his oral evidence, Mr Ponce de Leon denied that this conversation had taken place because, he said, as far as he was aware, he had been on holiday on 13 August 2021. However, on cross-examination by the Claimant, including the Claimant informing Mr Ponce de Leon that he was not in fact on holiday until the following week, Mr Ponce de Leon said that he in fact could not recall the conversation, that he was not saying "*yes or no*", and he would have to check.

10. It is not in dispute that on Monday, 16 August 2021, Mr Casciaro received a telephone call from the owner of Trends, Mr Nichalani, wishing to make a complaint about the incident on 13 August 2021, specifically that the Claimant's manner to members of Trends' staff had been aggressive and disrespectful. Mr Nichalani offered to send the shop's CCTV video recording of the incident, which offer was accepted by Mr Casciaro, who forwarded the video recording to Mr Rose.

11. The short video recording (without sound) was put into evidence by Mr Rose and played at the Hearing. The Claimant can be seen approaching a shop assistant with a handful of receipts, shouting and waving his arms, the customer whom the shop assistant was serving

appearing surprised and the intervention of a male member of staff ushering the Claimant out of the shop, apparently shouting and pointing his finger at the Claimant. The Respondent did not submit any evidence from either of the Trends shop assistants.

12. Mr Rose states in his incident report that on 16 April 2021 (it emerged from both parties' oral evidence), he asked the Claimant to come to the office. When the Claimant arrived, Mr Rose informed him of the complaint and asked him to explain what had occurred. The Claimant alleges in his Claim Form that when he was called to the office, Mr Rose told the Claimant that he was "*looking at a gross misconduct charge*". Mr Rose alleges in his incident report that the Claimant "*was extremely defensive and highly agitated by the incident and categorically denied any wrongdoing*". Mr Rose then played the video recording for the Claimant to see and states: "*To my surprise [the Claimant] still maintained that his behaviour was acceptable. It was at this point I verbally notified [the Claimant] that the matter would be further investigated to determine whether disciplinary proceedings would be initiated.*" In the Response Form, the Respondent states: "*When confronted with the video evidence, Mr Williams refused to take accountability for his actions and could not see that he had been at fault. The company operates a zero tolerance policy on aggression, either physical or verbal aggression is considered grounds for dismissal as stated in the employees company contract.*"

13. In his oral evidence, Mr Casciaro said that he had been present at a meeting, which may have been on 16 August 2021, when Mr Rose allegedly asked the Claimant to go to apologise at Trends, but that the Claimant refused because he did not think he had done anything wrong. Mr Rose said in his oral evidence that it was at that meeting that he offered to accompany the Claimant to Trends to make an apology. No mention of this offer by Mr Rose to accompany the Claimant was made in the Response Form or either gentleman's incident report.

14. In his incident report, Mr Rose states that it was Mr Nichalani who suggested the apology when, on 18 August 2021, Mr Rose "*was able to speak with*" Mr Nichalani and also Ms Ash (General Manager for Trends). In her open letter dated 1 October 2021 attached to the Response Form, Ms Ash confirms that the Claimant had "*verbally attacked a female member of our team on the shop floor in front of clients before being escorted out of the premises by the floor Manager. Members of our team have reported an incident where Mr Williams confronted the team again in Main Street but I do not have video footage to support such claims*." Mr Rose states that he was unable to speak to the shop assistant involved in the incident because she was on annual leave. Mr Rose goes on to state: "*it was suggested by Mr Nichalani that if [the Claimant] came and apologies* [stet] *for his behaviour to the aggrieved members of staff, the store was willing to let the matter drop, so long as there were no more incidents of a similar nature in the future.*"

15. As per a letter from Mr Rose to the Claimant dated 18 August 2021: "*it is the decision of management to initiate an investigation into the incident and disciplinary process on the grounds of gross misconduct … You will be notified within the next seven working days as to the conclusions of my investigation, you will also be informed at that time of any resulting disciplinary action that is to be taken.*"

16. In his incident report, Mr Rose states that on (Thursday) 19 August 2021, he verbally informed the Claimant (witnessed by Mr Casciaro) that he was: "*classifying the incident as serious misconduct, and contrary to his contract of employment. … that at the very minimum*

I expected him to agree to give an unreserved apology to the members of staff at the store. … [The Claimant] got extremely angry and point blank refused to apologise to anyone. I informed [the Claimant] that he was leaving me with little choice and that the incident was deemed a dismissal offence." I provided to [the Claimant] later the same day a formal written letter on the results of the investigation and actions that would be taken. I gave [the Claimant] until the 23rd August 2021 to give me his response to the requirements of the letter."

17. The letter to the Claimant dated 19 August 2021 states that the evidence reviewed in Mr Rose's investigation: "*clearly shows that your manner was indeed both confrontational and aggressive, to the point that store clients were made to feel alarmed by your behaviour. I find that the complaint against you is justified, and your behaviour was contrary to the terms and conditions of your employment.*"

18. The letter went on to state that the operations director of Trends was however: "*willing to allow the matter to be considered as settled, if [the Claimant] agree to giving an unreserved apology to both the floor manager and the member of staff involved*", and without trying to justify his behaviour. The letter continued that, should the Claimant make the apology, then the letter would constitute a final warning with respect to any future behaviour of a similar nature and would remain "*a permanent part*" of the Claimant's employment record. Any further incidents or complaints from clients of a similar nature would result in the Claimant's employment being terminated. If the Claimant refused to make the apology, or make it not in the manner requested, the Respondent would "*be left with no choice but to institute a dismissal process*" and terminate the Claimant's employment for serious misconduct.

19. In Mr Rose's incident report, he states that he was informed by Mr Casciaro that for the remainder of the week the Claimant refused to make the apology and did not see why he should be forced to do so. This is confirmed by Mr Casciaro's incident report. In his email to the Tribunal dated 4 October 2021 attaching the Response Form, Mr Rose said: "*I became very concerned a few days after the incident occurred, primarily with [the Claimant's] attitude and statements regarding the incident… showed no remorse for his actions and any apologies … would have been empty and forced … During the investigation, Mr Williams made several statements both to myself and other members of our team that led us to be convinced that this type of behaviour would reoccur given similar circumstances in the future …*".

20. Mr Rose states in his incident report that on (Monday) 23 August 2021, Mr Ponce de Leon advised the Claimant that the Respondent "*was serious about the consequences if [the Claimant] did not agree to apologise … it would be in his best interests to do so.*" Mr Rose goes on to say that he also spoke to the Claimant on 23 August 2021 (in front of Mr Casciaro and Mr Ponce de Leon) and asked him for his decision. The Claimant responded that he would make the apology: *"… for the good of the company. His manner suggested that he still refused to believe that he was in the wrong, and I had to remark that any such apology would need to be meant and I will be checking with the store manager to that effect.*" This part of the conversation is supported by the incident reports of Mr Casciaro and Mr Ponce de Leon and is not contradicted by the Claimant.

21. However, in his incident report, Mr Rose goes on to state: "*I informed [the Claimant] that he was to go directly to the store and see the store manager (Amber Ash) prior to any apology being made. [The Claimant] agreed …*".

22. In the Claim Form, the Claimant states: "*… the charge dropped if I made apology. Mr Rose said would accompany me for the apology (24th Aug 3.00 pm). The next day told not to come to work!*" However, under cross-examination, the Claimant seemed uncertain about when Mr Rose allegedly said this to him.

23. Mr Casciaro confirms in his incident report that on 23 August 2021 the Claimant reluctantly agreed to give the apology, for Mr Casciaro and Mr Ponce de Leon. But Mr Casciaro does not record Mr Rose's statement that Mr Rose told the Claimant to go directly to the store and see Ms Ash, nor the Claimant's statement that Mr Rose said he would accompany the Claimant to Trends to make the apology the next day at 3 p.m. When I asked Mr Casciaro in his evidence if he recalled what was discussed about the timing of the apology to be made by the Claimant, Mr Casciaro said that he could not recall, just that Mr Rose said that the apology had to be made, and that the apology had to be made honestly and sincerely.

24. In his incident report, Mr Ponce de Leon records that the Claimant agreed to make the apology: "*that day although still refusing to admit any wrongdoing.*" In oral evidence, he re-iterated that Mr Rose had said that the apology had to be made that day, and also said that he had no recollection of Mr Rose saying that he would go with the Claimant to Trends the following day to make the apology.

25. Mr Rose states in his incident report that, when checking with Ms Ash later on 23 August 2021, he was informed that the Claimant had not gone to the store. Mr Rose states that Ms Ash also informed him that the Trends shop assistant involved in any event refused to accept the Claimant's apology under any circumstances and that she had been severely shaken by the incident.

26. In the Response Form there is no mention at all of the Respondent's alleged instruction to the Claimant to make the apology or the Claimant's alleged failure to do so. The only reference to the Claimant apologising is the statement that the Trends shop assistant refused for the matter to be settled with an apology.

27. On 24 August 2021, Mr Ponce de Leon telephoned the Claimant to notify him that he was dismissed, as per the Response Form: "*Because of Mr Williams lack of accountability for his actions and by his own admition would act similarly given the same set of circumstances! it was deemed impossible for us to continue Mr Williams employment with our company* [stet]".

28. Mr Rose issued a dismissal letter dated 25 August 2021 in which again there was no reference to the instruction to the Claimant to make the apology or his alleged failure to do so. Instead, the letter states: "*Because of your actions and your failure to recognise that your behaviour was highly inappropriate and contrary to the terms and conditions of your employment for a member of staff representing this company and our UPS brand, it is the decision of management to terminate your employment with immediate effect on the grounds of serious misconduct. This decision has been taken because of the nature of the incident, and the lack of accountability that you have shown … It is the view of management that you can no longer be trusted to conduct yourself in a manner that is befitting a representative of this company.*" The letter went on to refer to section xii of the Claimant's employment contract and stated that the Claimant would be paid in lieu of notice and accrued holiday pay.

29. When I asked Mr Rose why the grounds for dismissal in this letter were different from the grounds set out in the 19 August 2021 final written warning letter, namely, the Claimant's confrontational and aggressive manner at Trends on 13 August 2021, Mr Rose said that this was due to "*naivety about what [he] should have written*" and he had "*no explanation*". He said that it worried him greatly that the Claimant did not seem to think he had done anything wrong. In his closing submissions, he said that the Claimant had been a good worker, solid and had got the jobs done. He also said that he wanted to keep hold of him. But from the Respondent's point of view, it could not keep on an employee who was volatile, a "*powder keg*", and more importantly who "*felt it was right to have a go at customers and members of the public*".

The law

Unfair dismissal

1. Section 59 of the Employment Act (**the Act**) provides that every employee with sufficient qualifying service shall have the right not to be unfairly dismissed by their employer.

2. Section 65 of the Act provides:

"(1) In determining …whether the dismissal of an employee was fair or unfair, it shall be for the employer to show–

> (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and
> (b) that it was a reason falling within the next following subsection, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) In subsection (1)(b) the reference to a reason falling within this subsection is a reference to a reason which– … (b) related to the conduct of the employee,..

(3) Where the employer has fulfilled the requirements of subsection (1), …

(6) the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case."

3. The correct approach to the application of section 65(6) in misconduct cases is set out in the well-known case of *British Homes Stores Ltd v Burchell* [1980] ICR 303):

(i) did the employer genuinely believe that the employee was guilty of the misconduct complained of?
(ii) if so, did the employer have reasonable grounds for that belief?
(iii) did the employer carry out as much investigation into the matter as was reasonable in all the circumstances of the case?
(iv) if all those requirements are met, was it within the band of reasonable responses,

which a reasonable employer might have adopted to the particular employee misconduct, for the employer to dismiss the employee (i.e. by the objective standards of a hypothetical reasonable employer, rather than by reference to the Tribunal's own subjective views)?

4. Thus, the Tribunal must ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place. Similarly, it is irrelevant that a lesser sanction may be reasonable or that other employers might reasonably have been more lenient (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91). Rather, the Tribunal must decide whether the employer's decision to dismiss the employee falls within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted. The EAT has emphasised the importance of the employee's length of service and past conduct as being factors to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions.

5. The 'range of reasonable responses' test applies equally to the procedures adopted by the employer by which the decision to dismiss is reached (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23).

6. In this respect, the Tribunal will take into account the Acas Code of Practice on Disciplinary and Grievance Procedures (**the Acas Code**). According to the Acas Code, there are some principles of procedural fairness that would apply to most cases where an employer is faced with a case of alleged misconduct, namely, that the employer should:

    - make proper enquiries to determine the facts;
    - inform the employee of the issues (in writing);
    - conduct a disciplinary hearing or meeting with the employee (at which they should be given the right to be accompanied and be previously warned that a possible outcome of the hearing is dismissal);
    - give the employee a reasonable opportunity to state their case in response, make representations, present evidence and ask questions;
    - act reasonably in all the circumstances in treating the misconduct as sufficient reason for dismissing the employee;
    - inform the employee of the decision in writing and include a right of appeal.

7. It should be noted that even where not every single one of these procedural steps have been taken, a dismissal can still be fair if the defects do not render the overall process intrinsically unfair. The Tribunal must evaluate the significance of any alleged procedural failing, because "*it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process*" and look at the question in the round and without regard to legal technicalities, adopting an holistic approach (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW).

8. However, it is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against a defendant or an employee facing dismissal should be precisely framed and they should only be found guilty of an offence with which they have been charged (*Strouthos v London Underground* [2004] IRLR 636 CA). Further: "*It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts*

of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case." (*Spink. v Express Foods Limited* [1990] IRLR 320.)

9. Finally, in respect of cases where a second disciplinary sanction for the same offence is imposed, in exceptional cases, this will be permissible: there is no such thing as 'double jeopardy' or 'res judicata' in internal disciplinary proceedings (*Christou & Ward v L.B. Haringey* UKEAT/0298/11/DIV). However, there must be a very serious and real reason for doing so, which will stand up to objective scrutiny (such as new management taking a different view of the alleged offence). In most cases, the Tribunal will expect an employer to get it right the first time, and will not allow an employer to have a second bite at the cherry. In any event, employers will be under the same duties of procedural fairness in respect of any second disciplinary procedure and the reasonableness of any altered sanction.

Remedies

10. Section 70 of the Act provides:

" … (2) Where on a complaint relating to dismissal the tribunal– (a) finds that the grounds of the complaint … are well-founded; and (b) considers that it would be practicable, and in accordance with equity, for the complainant to be re-engaged by the employer or to be engaged by a successor of the employer or by an associated employer, the tribunal shall make a recommendation to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so re-engaged or engaged.

(3) Where in such a complaint the tribunal finds that the grounds of the complaint are well-founded, but– (a) does not make such a recommendation as is mentioned in subsection (2); or (b) makes such a recommendation, and (for whatever reason) the recommendation is not complied with, the tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal."

Findings

1. It is undisputed that by its final written warning letter dated 19 August 2021 the Respondent imposed a sanction upon the Claimant because of his confrontational and aggressive behaviour at Trends on 13 August 2021, which amounted to gross misconduct, including under the terms of the Claimant's Contract of Employment. I find that this was a fair sanction based on reasonable grounds and following a reasonable investigation (Mr Rose's viewing of the video recording of the incident on 13 August 2021, the reports he received from Trends and speaking to the Claimant). I also find that the final warning was within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

2. The disciplinary procedure followed by the Respondent prior to the final warning dated 19 August 2021 was not perfect, including because it did not give the Claimant the right to be accompanied at the disciplinary meeting on 19 August 2021 (and certainly not the "*full right of representation of his/her case*", as provided for in the Contract of Employment), nor was the Claimant formally warned in advance of the meeting of the possible outcomes of the meeting, nor was he advised of his right to appeal the 19 August 2021 decision. However, overall, I do not consider that these flaws in the disciplinary procedure were significant

enough to render the decision unfair. Prior to the 19 August 2021 final written warning letter, the Claimant had been provided with all of the necessary information and had the opportunity to state his case in response, make representations, present evidence and ask questions. But the Claimant's consistently maintained position was that he had not done anything wrong and that he would do the same thing again in the same circumstances.

3. The final written warning letter dated 19 August 2021 was also clear with respect to the sanction to be imposed: a final warning on the condition that the Claimant make the unreserved apology to the Trends staff member, but if the Claimant refused to do so, or there were any other incidents or client complaints of a similar nature, the Claimant would be dismissed. I find that this sanction falls well within the range of reasonable responses that a reasonable employer in those circumstances and in the Respondent's business might have adopted when faced with the Claimant's aggressive conduct towards staff of one of its clients.

4. The events of 23 to 25 August 2021 however, I view quite differently.

5. It is not disputed that the Claimant had been told by the Respondent that he was required to make an apology to the Trends staff. In the 19 August 2021 final written warning letter, it was specifically stated that should the Claimant make the apology, then the letter would constitute a final warning, but if the Claimant refused to make the apology, or make it not in the manner requested, the Claimant would be dismissed.

6. The issue in dispute is what Mr Rose said to the Claimant at the meeting on 23 August 2021 about the timing of the Claimant's apology. The Claimant's allegation is that on 23 August 2021 Mr Rose told him that he would accompany him to Trends for the apology - on 24 August 2021 at 3 p.m. The Respondent's allegation is that Mr Rose told the Claimant that he must go directly (i.e. that day, 23 August 2021, and alone) to see Ms Ash at Trends for the purpose of making the apology.

7. None of the oral evidence was very convincing in support of either allegation, perhaps quite understandably given that the Hearing took place more than 2 1/2 years after the events in question.

8. The Claimant did not confirm when I asked (more than once) that the offer to accompany him for the apology the next day had indeed been made by Mr Rose on Monday, 23 August 2021, as he alleged. He rather referred to Mr Rose offering to accompany him for the apology "*on the Wednesday*", and referred both to a meeting with Mr Rose in Mr Rose's office (which could have been the meeting on 16 August 2021 described above) and also (perhaps not understanding the question) to a telephone call with Mr Ponce de Leon when the Claimant was walking down Main Street. When I asked the Claimant if, when Mr Ponce De Leon telephoned him on the morning of 24 August 2021 to dismiss him, the Claimant had raised the alleged arrangement for him to go with Mr Rose to make the apology at 3 p.m. that day, he said that he had not because, he said, it was early in the morning.

9. In his oral evidence, Mr Rose said that he had in fact first discussed with the Claimant accompanying him to Trends to make the apology at the meeting with the Claimant in his office the previous week, on 16 August 2021. But no mention of this was made in the Response Form or in Mr Rose's incident report dated 26 October 2023, which omission Mr Rose put down to his deeming the discussion irrelevant as the Claimant had at that stage

refused to make the apology, and the 2 year time gap. In addition, Mr Rose was unable to answer my question as to why he had raised the possibility of the Claimant making the apology on 16 August 2021, before this had been raised by Trends (which he said happened on 18 August 2021), save to say that he "*wanted to get ahead of*" the problem.

10. The allegation that on 23 August 2021 Mr Rose told the Claimant to go directly to Trends to make the apology was only first made in Mr Rose's incident report dated 26 October 2023, and not mentioned at all in the Response Form dated 4 October 2021, which provides: "*Mr Williams was asked to apologise to the member of our client's staff, however the member of staff was fearful to be confronted by Mr Williams again and refused for the matter to be settled with an apology*." Nor is any mention of the apology at all made in the dismissal letter dated 25 August 2021, although it had formed a major part of the final written warning letter dated 19 August 2021, from which it is quite clear that so long as the Claimant agreed to give "*an unreserved apology to both the Trends floor manager and the member of staff involved*", and without trying to justify his behaviour, then Trends was "*willing to allow the matter to be considered as settled*" and the sanction would be an "*official and final warning*". But no mention is made even in this 19 August 2021 final written warning letter of when the apology had to be made.

11. Mr Casciaro confirmed in his written and oral evidence only that on 23 August 2021 the Claimant was asked again to give the apology, without any reference to when. Mr Casciaro said in his oral evidence that, "*to be honest*", he could not remember if Mr Rose said when the apology had to be made or that it had to be made first thing, although he did remember Mr Rose emphasising that the apology had to be honest and sincere.

12. In his written and oral evidence, Mr Ponce de Leon said that on 23 August 2021 the Claimant had agreed to make the apology "*that day*", and that it was due to the Claimant not going to make the apology and that "*furthermore*" the staff member in question had refused to accept any apology, that Mr Rose proceeded to dismiss the Claimant. I was dubious of Mr Ponce de Leon's evidence, given that he changed his oral evidence on the Claimant's allegation that the Claimant had telephoned him on 13 August 2021 after the incident at Trends, from a confident statement (made twice) that the Claimant had not called him that day because, he said, he had been on holiday to, when he was told that he had not been on holiday that day, "*I don't recall*".

13. Mr Rose alleges that the principal reason for his telephone call to Ms Ash on 23 August 2021 was to check whether the Claimant had gone to the store that day. But the Respondent did not call Ms Ash to give oral evidence and it was not therefore explained why in her open letter dated 1 October 2021 she makes no mention of this telephone conversation, nor does she refer in her open letter to any prior agreement with Mr Rose that the Claimant would go to see her prior to making the required apology. Mr Rose's unpersuasive explanation for this omission was that the Respondent did not ask Ms Ash to include this clearly highly relevant information in her statement.

14. Having considered all the above-described conflicting and non-conclusive evidence, I find that it is more likely than not that Mr Rose did offer to accompany the Claimant to make the apology at Trends (this is not disputed), but that this offer was most likely first made on 16 August 2021 and then referred to by the Respondent's staff during the following week. I base this finding on the Claimant's inability to recall in oral evidence when this offer was allegedly made by Mr Rose and the likelihood that, if Mr Rose's alleged offer to accompany

the Claimant for the apology on 24 August 2021 at 3 p.m. had been made, the Claimant would surely have raised this with Mr Ponce De Leon who telephoned him that morning to inform him of his dismissal.

15. On the other hand, although I find that Mr Rose instructed the Claimant to make the apology to the Trends staff member and said that the apology had to be sincere (which I do not believe was disputed), the balance of evidence as described above, in particular the omission of any reference to the apology, let alone its timing, in the dismissal letter dated 25 August 2021 or in the Response Form dated 4 October 2021, does not support a finding that Mr Rose told the Claimant on 23 August 2021 that he had to go that day or "*directly*".

16. On the balance of probabilities, in particular the fact that the Respondent admits that on 23 August 2021 Ms Ash told Mr Rose that the Trends shop assistant refused to accept any apology from the Claimant, and the next day the Respondent dismissed the Claimant, notably without making any reference in its dismissal letter to the apology, it seems to me more likely than not that the real reason for the dismissal was because Ms Ash told Mr Rose that the shop assistant refused to accept the Claimant's apology, meaning that the matter had not been settled and Mr Rose had no solution to offer to its aggrieved customer Trends as regards the 'problem' of the Claimant, save for dismissal. If I am right on this finding, then the principal reason for the Claimant's dismissal was in fact "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held" (one of the fair reasons under Section 65(1)(b) of the Act).

17. Even if I am wrong on this finding, and the real reason for the dismissal was that the Claimant had not gone on 23 August 2021 to make the apology, as allegedly ordered to do by Mr Rose (if I had found this allegation to be made out, which I have not), this would mean that the principal reason for the dismissal was the Claimant choosing "*not to make the apology or failing to make the apology in the manner stated*" (as per the final written warning letter dated 19 August 2021) and therefore misconduct under Section 65(1) and (2) of the Act. However, neither this nor the refusal by the Trends shop assistant to accept any apology from the Claimant are the reasons for the dismissal expressly stated in the Respondent's dismissal letter dated 25 August 2021. Nor does the dismissal letter refer to the final warning (in the final written warning letter dated 19 August 2021) that: "*Any further incidents or complaints from clients of a similar nature will result in your employment being terminated*."

18. In fact, the first stated reason for the dismissal in the 25 August 2021 dismissal letter is the Claimant's aggressive and confrontational behaviour at Trends on 13 August 2021. But the Claimant had already been investigated and sanctioned in this regard, as notified by the Respondent's final written warning letter of 19 August 2021. I therefore find (following *Christou & Ward v L.B. Harringey UK* EAT/0298/11/DIV) that, given no evidence was presented of there being a serious and real reason for the Respondent imposing a second sanction for the same offence, the Claimant was entitled not to be sanctioned again in this way.

19. The other stated reasons for the dismissal in the dismissal letter were: the Claimant's "*failure to recognise that [his] behaviour was highly inappropriate and contrary to the terms and conditions of [his] employment for a member of staff representing this company and our UPS brand*"; and the Respondent's lack of trust in the Claimant to conduct himself "*in a manner that is befitting a representative of this company*". I find that both these complaints

might well amount to misconduct, and a fair reason for dismissal, under Sections 65(1) and (2) of the Act. However, these new complaints - the Claimant's lack of accountability for his actions and the Respondent's consequent lack of trust in the Claimant - had not been formally raised by the Respondent with the Claimant previously and there was no evidence that the Claimant had been made aware of their substance or detail. No disciplinary investigation had been undertaken nor a disciplinary meeting arranged at which the Claimant would have had the opportunity to address these new complaints, state his case in response, ask questions or present evidence. Again, ipso facto given that there was no meeting, the Claimant had not been given the right to be accompanied or been previously warned that a possible outcome of such a meeting was dismissal. To compound matters, the 25 August 2021 dismissal letter did not give the Claimant the right to appeal the dismissal.

20. I therefore find that the Respondent's decision to dismiss the Claimant for gross misconduct falls outside the range of reasonable responses that a reasonable employer in those circumstances and in the Respondent's business might have adopted, due to the failings in the disciplinary procedure it followed on 23 to 25 August 2021, and therefore that the Claimant's Claim of unfair dismissal is well-founded and succeeds.

Remedy

1. In his Claim Form, the Claimant stated that, if successful, he was seeking reinstatement and an apology or, if reinstatement was not possible, compensation. In this respect, Mr Rose for the Respondent gave compelling and consistent evidence that, despite the previous high regard in which it had held the Claimant, the Respondent had lost trust in the Claimant as a result of his conduct on 13 August 2021 and his subsequent unwillingness to recognise the impropriety of his actions. I did not doubt this evidence and I find that the Respondent does genuinely believe that the trust and confidence between the Respondent and the Claimant has irretrievably broken down, and I also find that this belief is not irrational, given that the Claimant did not dispute that he did not believe he had done anything wrong on 13 August 2021. This finding means that it is impracticable, and not in accordance with equity, for a recommendation of re-engagement to be made under Section 70 of the Act. Recommendations (including that an apology be made) are not an available remedy for a finding of unfair dismissal.

2. I shall therefore make an Award of compensation, further to an Awards case management directions order (which shall accompany this Judgment) and Hearing.

3. Given this Judgment - that the Claimant's dismissal was unfair because of the failings in the disciplinary procedure adopted by the Respondent - the parties are alerted to the application of *Polkey v AE Dayton Services Ltd* [1988] ICR 142 HL, which case establishes that the compensation payable to a claimant may be reduced to reflect the chance that the claimant would still have been dismissed even if a fair procedure had been followed (the Tribunal must assess the percentage likelihood of dismissal occurring in any event, even if that would have taken longer).

4. The parties are also alerted to Sections 2(5), 3(4) and 3(6) of the Employment Tribunal (Calculation of Compensation) Regulations 2016:

"2(5) Where the Employment Tribunal considers that any conduct of the employee before

the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Employment Tribunal shall reduce or further reduce that amount accordingly."
"3(4) In ascertaining the loss [the compensatory award] the Employment Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss …
3(6) Where the Employment Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Gabrielle O'Hagan

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Gabrielle O'Hagan, Chairperson
21 May 2024